

**IN THE HIGH COURT OF JUDICATURE AT
PATNA**

First Appeal No.1031 of 1978

**Against the Judgment and Decree dated 11.11.1976 passed by the
Second Addl. Subordinate Judge, Aurangabad in partition suit
No.53 of 1976 A.S.J.-II, Aurangabad / 173 of 1972 S.J.-I, Gaya.**

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Dharm Raj Yadav & Ors.

.....Defendants-Appellants

Versus

Karmi Kumari & Ors.

.....Plaintiff-Respondents

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Appearance :

For the Appellant/s :	Mr. S. S. Dwivedi, Sr. Advocate Mr. Udit Narayan Singh, Advocate with him.
For the Respondent/s :	Mr. Bhanu Pratap Singh, Advocate Mr. Dhruv Narayan, Sr. Advocate Mr. Birendra Kumar Singh-1, Advocate. Mr. Jairam Sharma, Advocate.

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Dated : 24th day of April, 2013

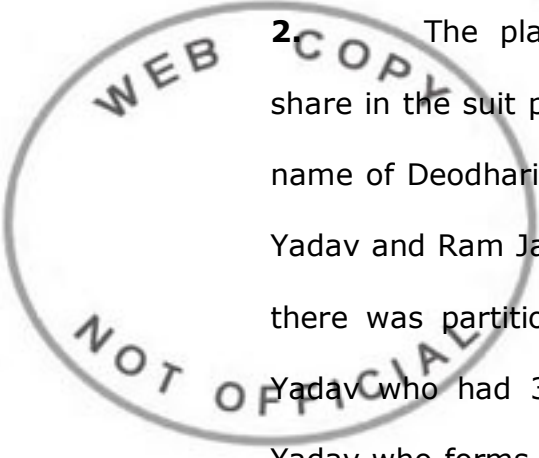
P R E S E N T

CORAM : THE HON'BLE MR. JUSTICE MUNGESHWAR SAHOO

CAV J U D G M E N T

1. The defendants have filed this First Appeal challenging the Judgment and Decreed dated 11.11.1976 passed by the learned Second Addl. Subordinate Judge, Aurangabad in partition suit No.53 of 1976 A.S.J.-

II, Aurangabad / 173 of 1972 Sub Judge I, Gaya whereby the learned Court below decreed the plaintiff-respondent's suit for partition.

2. The plaintiff respondent filed the aforesaid suit claiming half share in the suit property alleging that the suit land stands recorded in the name of Deodhari Yadav, Lali Yadav having two shares and Ram Khelawan Yadav and Ram Jatan Yadav having one share. 2-3 years after the survey, there was partition between them. The suit lands were allotted to Lali Yadav who had 3 sons namely, Raghu Yadav, Jadu Yadav and Kuldeep Yadav who forms joint family governed by Mitakshara school of Hindu Law. Kuldeep Yadav, pre-deceased his father unmarried. After death of Lali Yadav, Raghu Yadav became the *karta* and on his death, Dhramraj Yadav, the eldest son of Raghu became the *karta*. The Schedule 'B' lands were acquired by Lali Yadav in the name of his one or other son. The Schedule 'C' land was acquired by State of Bihar in land acquisition case No.27 of 1971-72 and compensation amount of RS.7595.14/- was received by Dhramraj Yadav as *karta*. There has been no partition between the party, therefore, the plaintiff are entitled to half share including the compensation amount also.

3. According to the defendant-appellants, their case in short is that just after the death of Lali Yadav, there was amicable partition of all the joint family property about 40 years ago. The Schedule 'A' land was allotted to the plaintiff whereas Schedule 'B' land was allotted to the defendants in the said partition. Dhramraj Yadav was never the *karta* of the family of the plaintiffs. The lands acquired by the State of Bihar described in Schedule 'C' was the property allotted to the defendants, therefore, the compensation money was paid to them. The defendants also purchased 4.66 acres of land by registered sale deed which is described in Schedule 'D' of the written

statement. Since, there is no unity of title and possession, the suit is liable to be dismissed, the defendants also took various legal and ornamental please.

4. On the basis of the aforesaid pleadings of the parties, the trial Court framed the following issues :

- (i) Is the suit as framed maintainable?
- (ii) Have the plaintiff got any cause of action for the suit?
- (iii) Is there any unity of title and possession between the parties in respect of the suit lands?
- (iv) To what relief or releifs, if any, are the plaintiffs entitled to?

5. After trial, the learned Court below came to the conclusion that there had been no partition between the parties, as such there is unity of title and possession and accordingly, decreed the plaintiff's suit.

6. It appears that during the pendency of this First Appeal, the appellants filed the following interlocutory applications :-

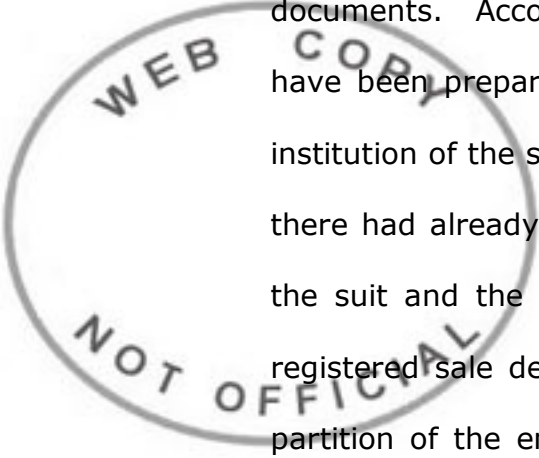
- (i)** I.A. No.6131 of 2005.
- (ii)** I.A. No.6444 of 2008
- (iii)** I.A. No.3584 of 2008
- (iv)** I.A. No.5247 of 2009
- (v)** I.A. No.5432 of 2010
- (vi)** I.A. No.4383 of 2011.
- (vii)** I.A. No.5431 of 2010

7. All these interlocutory applications have been filed under Order 41 Rule 27 of the Code of Civil Procedure seeking permission to adduce additional evidence. Along with interlocutory applications, certified copy of the registered sale deeds have been filed along with other documents. It appears that order was passed to the effect that these interlocutory applications shall be considered at the time of final hearing of the appeal and, therefore, the parties were heard at length on these interlocutory

applications also. However, the learned counsel for the appellant did not press interlocutory application No.6131 of 2005 and 5431 of 2010.

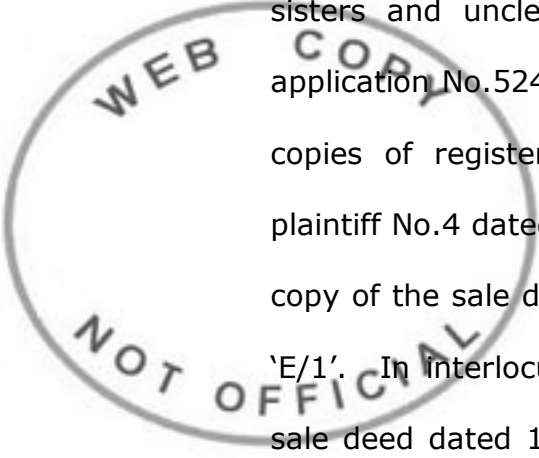
Accordingly, both these interlocutory applications are rejected as not pressed.

8. The learned senior counsel, Mr. S. S. Dwivedi appearing on behalf of the appellant submitted that the learned Court below misread and misinterpreted the oral evidence as well as documentary evidence produced by the appellant and the respondents and wrongly recorded the finding to the effect that there has been no partition between the parties. According to the learned counsel, the witnesses examined by the defendant appellant clearly stated that there had already been partition amicable between the parties just after the death of Lali Yadav 40 years ago but the Court below disbelieved the witnesses on the ground that no document had been produced in support of the case of previous partition. The learned counsel further submitted that the learned Court below heavily relied upon ext.2 and observed that this ext.'2' which is sale deed clearly proves the case of the plaintiff that there had been no partition. Although in fact ext.'2' is a mortgage deed. The learned counsel further submitted that during the pendency of the appeal, the plaintiff-respondents executed many sale deeds and sold the properties to strangers wherein the plaintiffs clearly admitted the fact that there had been partition between the parties and the plaintiff respondent is selling the said property which was allotted to him / them in partition. Since these sale deeds came into existence during the pendency of the appeal, one after other and when it came to the knowledge of the appellant, the interlocutory applications have been filed one after the other for permission to adduce additional evidence. The learned counsel submitted that the sale deeds have been executed by the respondents and



there is no denial by the respondents about the genuineness of the document or non-execution, therefore, these documents are admitted documents. According to the learned counsel, still today no final decree have been prepared, therefore, admittedly, there is no partition after the institution of the suit. It goes without saying that the plaintiff admitted that there had already been partition between the parties prior to institution of the suit and the properties were allotted to them were sold by them by registered sale deed. However, with ulterior motive, the plaintiffs claimed partition of the entire property again by suppressing real fact of partition and thereby played a fraud on the Court. Subsequently, by series of registered sale deeds the plaintiffs admitted the fact that there had already been partition although in the plaint they pleaded that there had been no partition. All these sale deeds are necessary to be considered as additional evidence for doing justice between the parties. These sale deeds were not in existence during the pendency of the suit. All these sale deeds came into existence during the pendency of the appeal, therefore, these documents are subsequent documents.

9. The learned counsel pressed interlocutory application No.3584 of 2008. With this interlocutory application, Annexure 'A', i.e., certified copy of the sale deed executed by Munrik Yadav plaintiff No.4 in favour of Meena Devi on 7.11.2007 has been annexed. The learned counsel submitted that in this sale deed, the plaintiff No.4 has clearly stated that after the death of father the ancestral property was divided between 3 brothers and they came separately in possession. Likewise the learned counsel pressed I.A. No.6444 of 2008 wherein the three sale deeds of Karmi Devi, daughter of plaintiff No.2 executed in favor of stranger have been annexed as Annexure 'A/1, 'B/1' and 'C/1'. The learned counsel submitted that in all these 3 sale



deeds, the executants, i.e., the vendor Karmi Devi daughter of plaintiff No.2 stated that the property came in her possession on partition between the sisters and uncle. The learned counsel also pressed the interlocutory application No.5247 of 2009. In this interlocutory application, two certified copies of registered sale deeds have been annexed, one executed by plaintiff No.4 dated 27.8.2008 as Annexure 'D/1' and the other, the certified copy of the sale deed dated 24.6.2006 executed by plaintiff No.3 Annexure 'E/1'. In interlocutory application No.5432 of 2010, the certified copy of sale deed dated 1.6.1968 executed by plaintiff No.1 has been annexed as Annexure 'C' and likewise in I.A. No.4383 of 2011 certified copy of the sale deed executed by defendant No.1 dated 26.4.1969 has been annexed as Annexure 'B'. The learned counsel for the appellant submitted that the sale deeds executed by plaintiff No.1 which has been annexed as Annexure 'C' to I.A. No.5432 of 2010 is dated 1.6.1968 which is prior to institution of the suit and likewise the sale deed Annexure 'B' of I.A. No.4383 of 2011 is dated 26.4.1969 executed by defendant No.1 wherein it is clearly mentioned that there had been amicable partition. According to the learned counsel, all these additional evidences have direct and important bearing on the main issue between the parties in the suit, therefore, the said evidence be permitted to be brought on record by allowing the interlocutory applications for the interest of justice.

10. The learned counsel further submitted that the only defence of the appellant was that there had already been partition whereas according to the plaintiff-respondent, there had been no partition. The respondents have already appeared in this appeal and they were knowing the fact about the previous partition and also the finding of the trial Court but they gave false evidence before the Court contrary to the admission by them made in

the registered sale deed executed by them. Therefore, the plaintiff respondent cannot be allowed to a probate and reprobate with a view to get advantage according to the situation and according to their wish. On all these grounds, the learned counsels submitted that since the admission is the best evidence, unless it is explained the impugned Judgment and Decree is liable to be set aside because of admission made by the respondent is in favour of the appellant.

11. On the other hand, the learned senior counsel Mr. Dhruv Narayan appearing on behalf of the plaintiff-respondent submitted that at this stage, the appellant cannot be permitted to adduce additional evidence because it cannot be said that on the basis of the evidence available on record, no Judgment can be pronounced. Only on the ground of subsequent existence of the documentary evidence, the same cannot be admitted into the evidence as additional evidence. The learned counsel further submitted that the legality or otherwise of the impugned Judgment cannot be considered on the basis of subsequent execution of registered sale deeds. Moreover in the sale deeds sought to be adduced as additional evidence, the vendor of the sale deeds only referred to Khangi partition and they never admitted that there was partition by metes and bond. According to the learned counsel, the parties might have come in possession of separate properties and they sold the same but because they sold the same, it cannot be conclusively decided that there had been partition between the parties by metes and bond, therefore, the parties sold their lands. The learned counsel further submitted that the certified copy of the sale deeds cannot be admitted to additional evidence unless the original is called for because certified copy of the sale deed is secondary evidence. On these grounds, the learned counsel submitted that the interlocutory applications

are liable to be rejected. Since the finding of no partition has been recorded by the Court below on the basis of oral evidence, the appellate Court cannot interfere with the findings on the same set of oral evidence. On these grounds, the learned counsel submitted that the First Appeal is liable to be dismissed with cost.

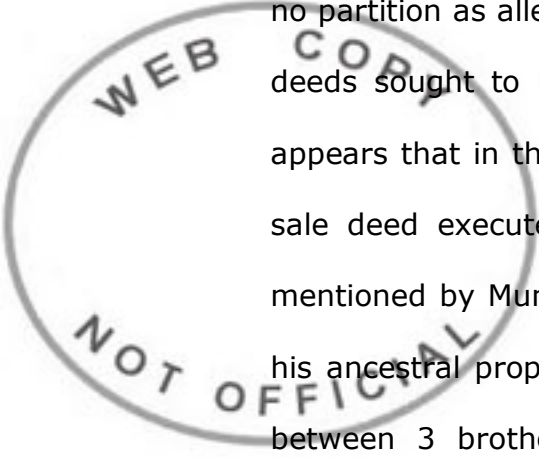
12. In view of the above contentions of the parties, the following points arises for consideration in this appeal :-

(i) Whether the appellants can be permitted to adduce additional evidence as prayed for by the appellants in the interlocutory applications mentioned above?

(ii) Whether there had been partition between the parties or still there is unity of title and possession between the parties and whether the impugned Judgment and Decree are sustainable in the eye of law?

13. Since both the points are inter-connected, both the points are taken together.

14. In the case of ***Union of India Vs. Ibrahim Uddin & Anr. 2012 (8) SCC 148 = 2013 (1) PLJR 48 SC***, the Hon'ble Supreme Court at paragraph 49 of SCC has held that "**an application under Order 41 Rule 27 C.P.C. is to be considered at the time of hearing of the appeal on merit so as to find out whether the documents and / or the evidence sought to be adduced have any relevance/ bearing on the issues involved.** In the present First Appeal at our hand, there is order to the effect that the interlocutory applications filed by the appellant under Order 41 Rule 27 C.P.C. shall be considered at the time of final hearing and accordingly as stated above, I have already heard the parties on merit. The



only dispute between the parties is as to whether there was partition between the parties as alleged by the appellant or whether there has been no partition as alleged by the plaintiff-respondent. From perusal of the sale deeds sought to be adduced as additional evidence as detailed above, it appears that in the sale deed annexed with I.A. No.3584 of 2008, i.e., the sale deed executed by Munrik Yadav, plaintiff No.4, it has clearly been mentioned by Munrik Yadav the executant thereof that the sold property is his ancestral property which came to him on partition by metes and bond between 3 brothers after death of their father and he is in peaceful possession. Likewise in the other sale deeds mentioned above, annexed with I.A. No.6444 of 2008, the daughter of plaintiff No.2, namely, Karmi Devi mentioned that there was amicable partition between Uncle and sisters and she got sold property in her share. In the sale deeds annexed with I.A. No.5247 of 2009 two sale deeds executed by plaintiff No.3 and plaintiff No.4, it is mentioned by the executant that the sold property was the ancestral property which they got in their share in amicable partition and they came in possession thereof according to partition. These sale deeds admittedly came into existence during the pendency of this First Appeal. This First Appeal is of the year 1978. The plaintiff-respondent were knowing their pleading in the plaint to the effect that there had been no partition, therefore, they have filed partition suit. The witnesses examined on behalf of the plaintiff have stated that there had been no partition. It further appears that the defendants have adduced evidence in support of their case that there had already been partition between the 3 brothers after the death of their father. D.W.9 is one of the defendant. He stated about previous partition between the parties. The trial Court disbelieved this evidence of this witnesses only on the ground that in the cross

examination, he stated that partition took place last year. The other witnesses of defendants are D.W.3 to 5, 7 and 8 all have stated about previous partition between the parties. The defendant witnesses No.4, 5, 6 and 7 have been disbelieved on the ground that they are of different village and that in the cross-examination, they have admitted that they have no concern with the affairs of the defendants.

15. The defendants have also produced ext. E, F and G, i.e., documents showing acquisition of one acre and 36 decimal and payment of compensation under the Land Acquisition Act to the defendant D.W.9. The trial Court disbelieved the case of the defendant that since the property was exclusive property of the defendant, he has received the compensation on the ground that in the cross-examination, he has stated that he got the property in partition last year. In my opinion, the approach of the trial Court is wrong. The trial Court decided the legality or otherwise of the documentary evidences on the basis of the oral evidence. The learned Court below also relied upon ext. 2, i.e., mortgage deed and on that basis, the trial Court came to the conclusion that the parties are joint, although it is fact that the property mortgaged, i.e., ext.2 is not the subject matter of the suit, therefore, the Court below has committed error of record also. It may be mentioned here that the witnesses examined by the plaintiff P.W.1, 3, 5, 6 have all stated only to the effect that there had been no partition.

16. Now, let us examine the case of the plaintiff in the light of the documentary evidences sought to be adduced as additional evidence. The plaintiffs specifically pleaded that there had been no partition of the ancestral property and this was the finding of the trial Court also. There is no documentary evidences in support of previous partition. The real dispute between the parties is whether there was previous partition or no

partition. In all the sale deeds sought to be produced, the plaintiff respondent clearly admitted that there had been partition between the 3 brothers after the death of their father. The daughter of plaintiff No.2 even admitted that there had been partition between the sisters and she got the sold property in her share and came in possession. Therefore, these are the admissions made by the plaintiffs and it appears that there has been intersee partition between the plaintiffs or their heirs.

17. Order 41 Rule 27 of the Code of Civil Procedure reads as follows :-

"27. Production of additional evidence in Appellate Court :- (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if –

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or)

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Whenever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

18. In *AIR (38) 1951 SC 193 Arjan Singh Vs. Kartar Singh*, the Apex Court has held that **the discretion to receive and admit additional evidence is not an arbitrary one, but is a judicial one circumscribed by the limitation specified under Order 41 Rule 27 of the Code of Civil Procedure.**

19. In **AIR 1963 SC 1526 K. Venkataramiah Vs. A. Seetharama Reddy and Others**, the five Judges Bench of the Apex Court at paragraph 10 has held as follows :

"10. Section 107 of the Code of Civil Procedure empowers the appellate court "to take additional evidence or to require such evidence to be taken," "subject to such conditions and limitations as may be prescribed." Rule 27 of O. 41 of the Code of Civil Procedure prescribes the conditions and limitations in the matter. The rule first lays down that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate court. It then proceeds to lay down two classes of cases where the appellate court may allow additional evidence to be produced. One class is where the Court appealed from has refused to admit evidence which ought to have been admitted. The other class is where the appellate court requires such additional evidence for itself either to enable it to pronounce judgment or for any other substantial cause. The second class of the rule requires that when additional evidence is allowed to be produced by an appellate Court the Court shall record the reason for its admission.

20. In the said decision at paragraph 16, it has been held by the Apex Court that **"apart from this, it is well to remember that the appellate court has the power to allow additional evidence not only if it requires such evidence "to enable it to pronounce judgment" but also for "any other substantial cause". There may well be cases where even though the court finds that it is able to pronounce judgment on the state of the record as it is, and so, it cannot strictly say that it requires additional evidence "to enable it to pronounce judgment", it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner."**

21. In the case of **Union of India (Supra) 2012 (8) SCC 148 = 2013 (1) PLJR 48 SC,**, the Apex Court relying on the aforesaid decisions at paragraph 47 & 48 has held as follows :-

"47. Whether the additional evidence sought to be adduced removes the cloud of doubt over the case and the evidence has a

direct and important bearing on the main issue in the suit and interest of justice clearly renders it imperative that it may be allowed to be permitted on record, such application may be allowed.

48. To sum up on the issue, it may be held that an application for taking additional evidence on record at a belated stage cannot be filed as a matter of right. The Court can consider such an application with circumspection, provided it is covered under either of the prerequisite conditions incorporated in the statutory provisions itself. The discretion is to be exercised by the Court judicially taking into consideration the relevance of the document in respect of the issues involved in the case and the circumstances under which such an evidence could not be led in the Court below and as to whether the applicant had prosecuted his case before the Court below diligently and as to whether such evidence is required to pronounce the judgment by the appellate Court. In case the Court comes to the conclusion that the application filed comes within the four corners of the statutory provisions itself, the evidence may be taken on record, however, the Court must record reasons as to what basis such an application has been allowed. However, the application should not be moved at a belated stage”.

22. Admittedly, at the time of pendency of the suit, the documents, i.e., the sale deeds executed by the plaintiffs during the pendency of the appeal were not in existence. In other words, all the sale deeds executed by the plaintiffs and / or, their heirs during the pendency of the appeal are subsequent documents. Although these interlocutory applications were filed as far back as in the year 2008, 2009, 2010 and 2011 serving a copy of the same on the other side, no reply has been filed countering the allegations made by the appellant. In other words, the genuineness or the execution of the sale deeds by the plaintiffs during the pendency of this appeal is not denied. The only objection raised by the respondent is that the sale deeds are secondary evidence, therefore, the same cannot be admitted to evidence. In my opinion, this is nothing but a technical objection. The respondents are not denying the genuineness of the documents. They are not saying that they have not executed the documents.

23. From the above discussion, it appears that at the time of filing the plaint, the plaintiff-respondents concealed the true facts about previous partition and obtained a decree in their favour. However, during the

pendency of the appeal, they admitted the true fact by executing registered sale deeds. They have not explained the admission made by them in the registered sale deeds about previous partition. In my opinion, in view of the above facts, it appears to me that the case of the plaintiff- respondents is based on falsehood and they obtained a decree by suppressing the true fact and thereby played fraud on the Court.

24. In the case of ***S. P. Chengalvaraya Naidu (dead) by L.Rs., Appellants v. Jagannath (dead) by L.Rs. and others, AIR 1994 SC 853 = (1994) 1 SCC 1***, the Hon'ble Supreme Court has held that "the Courts of law are meant for imparting justice between the parties. One who comes to the Court, must come with clean hands. A person whose case is based on falsehood has no right to approach the Court. He can be summarily thrown out at any stage of the litigation. A Judgment or decree obtained by playing fraud on the Court is a nullity and non est in the eyes of law. Such a Judgment / decree by the first Court or by the highest Court - has to be treated as a nullity by every Court, whether superior or inferior. It can be challenged in any Court even in collateral proceedings. A fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a cheating intended to get an advantage.". It is settled law that "fraus et jusquam non cohabitant" i.e., fraud and justice never dwell together".

25. The same view has been taken by the Hon'ble Apex Court in the case of ***Smt. Badami Vs. Bhali 2012 (4) PLJR 25 SC*** by relying upon the aforesaid decision.

26. In view of the above discussion, the facts emerges that at one place, the plaintiff pleaded according to their choice and during the pendency of the appeal, they admitted the true fact. Now, therefore, only on the ground that unless the register from the Registry office is called for, the document which is secondary evidence cannot be admitted has got no force, particularly when the admission has not been explained, no counter affidavit or reply has been filed, the genuineness or otherwise of the registered sale deeds has not been disputed. Since the admission made in these sale deeds which are created during the pendency of the appeal have got direct and important bearing on the main issues between the parties in the suit and removes the cloud of doubts and, in my opinion, in the interest of justice, the appellant should be permitted to adduce additional evidence and accordingly the interlocutory applications except I.A. No.5432 of 2010 and I.A. No.4383 of 2011 are allowed. I.A. No.5432 of 2010 and I.A. 4383 of 2011 are hereby rejected as the sale deeds annexed with these interlocutory applications are prior to institution of the suit and there is neither admission nor any statement made by the plaintiff and the statement, if any, made by defendant No.1 can be termed as self serving statement.

27. In the case of *Union of India (Supra)*, the Apex Court has relying on the case of *Narayan Bhagwantrao Gosavi Balajiwale Vs.. Gopal Vinayak Gosavi and others AIR 1960 SC 100* decisions of the Apex Court has held that “**admission made by party though not the conclusive, is a decisive factor in a case unless the other party successfully withdraws the same or proves it to be an erroneous**”. In the present case at our hand, the admission made by the plaintiff in the registered sale deeds executed during the pendency of the appeal referred

to above, there is clear unambiguous admission of the plaintiff and their heirs to the effect that there had been partition between the 3 brothers after the death of their father. By serving the copies of the interlocutory applications to the learned counsels for the respondents, opportunity was granted to them either to controvert the allegation or to explain the admission but nothing has been done. Therefore, in my opinion, the admission made by the plaintiffs-respondents in the present case are decisive in nature.

28. In view of the above facts and circumstances of the case, in my opinion, the plaintiffs-respondents are playing hide and seek game in this case and are approaching the Court with unclean hand with a view to gain undue advantage even by suppressing true facts. As discussed above, therefore, I come to the conclusion that the appellants have been able to prove that there had already been partition between the parties as pleaded by the defendants. The contrary finding of the trial Court is thus hereby reversed.

29. In the result, this First Appeal is allowed and the impugned Judgment and Decree are set aside. The plaintiff's suit for partition is dismissed with cost of Rs.10,000/- to be paid by the plaintiffs-respondents to the appellants within 2 months failing which the appellant shall be at liberty to realize the same through process of the Court.

(Mungeshwar Sahoo, J.)

Patna High Court, Patna
The 24th April, 2013
Sanjeev/A.F.R.